

SUPREME COURT OF NOVA SCOTIA

Citation: *Credit Union Atlantic Ltd. v. Hebron Hospitality Group Inc.*,
2021 NSSC 40

Date: 20210205

Docket: Hfx No. 485041

Registry: Halifax

Between:

Credit Union Atlantic Limited, a body corporate, registered to do business in the
Province of Nova Scotia

Plaintiff/Applicant

v.

Hebron Hospitality Group Inc., formerly 3295522 Nova Scotia Limited, operating
as Smiling Goat Organic Espresso Bar, and 3294118 Nova Scotia Limited, in its
capacity as Guarantor and Jagpreet Singh, in his capacity as Guarantor

Defendants/Respondents

<p>DECISION</p>

Judge: The Honourable Justice Denise Boudreau

Heard: January 5, 14, 2021, in Halifax, Nova Scotia

Counsel: Richard A. Bureau, for the Plaintiff/Applicant
Jagpreet Singh, self-represented, for the
Defendants/Respondents

By the Court:

Introduction

[1] The plaintiff makes application for Security for Costs in relation to a counterclaim made by the defendant in this litigation.

Background

[2] The plaintiff filed a Notice of Action for Debt in February 2019, in relation to alleged defaults on three commercial loans and one commercial line of credit. At the time, the total amount outstanding was over \$290,000. The claim was against the main corporate defendant, as well as a second corporation and Mr. Singh as guarantors.

[3] The defendants filed a Notice of Defence and Counterclaim in March 2019. The document was handwritten and filed by Mr. Singh himself. In the defence, the defendants blame the plaintiff for the default. The following paragraph is contained therein:

9. "Hebron" claim \$750K loss of business and in general damages because of CUA action.

[4] A defence to this counterclaim was filed by the plaintiff in April 2019.

[5] The present motion was filed in January 2020. Difficulties in service on the defendants soon became apparent. While it would appear that at some point in 2019/2020 the defendants had hired counsel, that counsel withdrew from the matter and would not accept service of the motion. In March 2020, difficulties related to the COVID-19 pandemic arose which delayed the matter further.

[6] The plaintiff's attempts to effect personal service of this motion were unsuccessful, and so they sought an order for substituted service. This order, granted November 5, 2020, made provision for various methods of service of the motion on the defendants, including posting to certain addresses and e-mailing. All of those methods were accomplished. The motion was scheduled to be heard January 5, 2021.

[7] Mr. Singh apparently received notice of this motion and date, as he filed documents with the court on January 4, 2021, in response. He indicated therein that he would be asking the court to grant an adjournment of the January 5, 2021, date so that he could seek legal advice.

[8] On January 5, 2021, Mr. Singh did not appear, without explanation. In recognition of the fact that Mr. Singh had filed documentation, but also recognizing the inconvenience to the plaintiff, I heard the plaintiff's motion on

January 5, 2021, and adjourned the completion of it to January 14, 2021. Mr. Singh was notified by email of this development and was told that if he wished to participate, he was to appear on January 14, 2021, to make his submissions in reply.

[9] Mr. Singh did appear on January 14, 2021, and made oral submissions opposing the plaintiff's motion. He also filed a number of documents in reply to the motion.

Analysis

[10] This motion is for security for costs, which is dealt with in CR 45.01-45.02:

45.01 Scope of Rule 45

(1) This Rule provides a remedy for a party who defends or contests a claim and will experience undue difficulty realizing on a judgment for costs if the defence or contest is successful.

(2) A party against whom a claim is made may make a motion for security for costs, in accordance with this Rule.

45.02 Grounds for ordering security

(1) A judge may order a party who makes a claim to put up security for the potential award of costs in favour of the party against whom the claim is made, if all of the following are established:

- a) the party who makes a motion for the order has filed a notice by which the claim is defended or contested;
- b) the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party;

- c) the undue difficulty does not arise only from the lack of means of the party making the claim;
 - d) in all the circumstances, it is unfair for the claim to continue without an order for security for costs.
- (2) The judge who determines whether the difficulty of realization would be undue must consider whether the amount of the potential costs would justify the expense of realizing on the judgment for costs, such as the expense of reciprocal enforcement in a jurisdiction where the party making the claim has assets.
- (3) Proof of one of the following facts gives rise to a rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means:
- a) the party making the claim is ordinarily resident outside Nova Scotia;
 - b) the party claimed against has an unsatisfied judgment for costs in a proceeding in Nova Scotia or elsewhere;
 - c) the party making the claim is a nominal party, or a corporation, not appearing to have sufficient assets to satisfy a judgment for costs if the defence or contest is successful;
 - d) the party making the claim fails to designate an address for delivery or fails to maintain the address as required by Rule 31 (Notice).
- (4) A judge may also order security for costs in either of the following circumstances:
- a) the security is authorized by legislation;
 - b) the same claim is made by the same party in another proceeding, and it is defended or contested by the party seeking security for costs on the same basis as in the proceeding in which security for costs is sought.

[11] In relation to 45.02(4)(a), the plaintiff notes s. 152 of the *Companies Act*,

RSNS 1989, c. 81:

Security for Costs

152 Where a limited company is a plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given.

[12] Although the plaintiff has not differentiated between the defendants, it seems from the pleadings that the counterclaim was brought by the defendant Hebron Hospitality Group Inc. (“Hebron”) only. I will, therefore, consider this as a request for an Order for Security for Costs against Hebron.

[13] Having said that, it appears that both defendant companies are intimately connected to each other, and to Mr. Singh. In relation to Hebron, Mr. Singh is the only individual noted in the Registry of Joint Stock (“RJS”) information; he is the director, CEO, president, and recognized agent of that company.

[14] I will go through each of the requirements of 45.01 in detail:

The party who makes a motion for the order has filed a notice by which the claim is defended or contested

[15] This is a simple requirement and the plaintiff has met it; the moving party here (the plaintiff) has filed a defence to the counter claim.

The party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party

[16] The plaintiff points out that Hebron has been subject to numerous judgments in the past. In the decision *Hebron Hospitality Group Inc. v. 778938 Ontario Ltd.*, 2018 NSSC 195 (“the *Ontario* case”), the court listed the outstanding judgments that the defendant Hebron had at that time:

4] By way of affidavit, Starfish has adduced evidence that Hebron, the Smiling Goat, and/or Mr. Singh has the following judgements against it:

- Boyne Clarke LLP in the amount of \$6392.43, issued January 17, 2018;
- Workers Compensation Board of Nova Scotia in the amount of \$895.74, issued February 22, 2018;
- Java Blend Coffee in the amount of \$9544.10, issued March 26, 2018;
- Gordon Food Service Canada Ltd. in the amount of \$3959.44, issued April 4, 2018; and
- Service Employees International Union, Local 2, Brewery, General and Professional Workers’ Union, in the amount of \$14,184.74, issued June 4, 2018.

[17] That same decision saw Hebron ordered to pay security for costs within that litigation for a total of \$23,000, to be paid in two installments.

[18] The plaintiff has also brought forward the issue of Hebron’s checkered status at the Registry of Joint Stock. The company has been revoked for non-payment, and later reinstated, numerous times. That has happened in each of the years 2017, 2018, and 2019. It was, in fact, revoked for non-payment throughout most of 2019 before being re-instated. Most recently, it has again been revoked for non-payment

in March 2020. As of the printout provided to me by plaintiff's counsel on January 5, 2021, it had not yet been reinstated and remains revoked as far as I know.

[19] The guarantor company (3494118 NS Ltd.) also showed as "revoked for non-payment" as of January 5, 2021, and has been since January 2020.

[20] These factors are some of the reasons for which the plaintiff is concerned that they will have difficulty realizing on any judgment for costs against the defendant Hebron, should the plaintiff be successful in the counterclaim.

[21] Mr. Singh, in response, notes that most of the judgments referred to by the plaintiff have now been satisfied, with the exception of one (which he did not identify). Among the documents he has filed are the following:

1. Trust Cheque from Quackenbush Thompson in relation to Hebron Hospitality, to Credit Union Atlantic in the amount of \$42,000, dated September 18, 2018; cover letter notes "full release of the security interest recorded under the Person Property Registry by registration number 26137679";
2. Certificate of Satisfaction from Small Claims Court re: Boyne Clarke judgment in the amount of \$6392.34 (2018);
3. Satisfaction Piece for \$9544.10 debt/judgment re: Java World (2018);

4. Certificate of Satisfaction from Small Claims Court re: Gordon Food Service judgment in the amount of \$3691.01 plus interest and costs (2018);
5. Certificate of Satisfaction from Small Claims Court “re: WCC judgment” in the amount of \$1944.88 (2018);
6. Certificate of Satisfaction from Small Claims Court “re: WCC judgment” in the amount of \$894.74 (2018);
7. Certificate of Satisfaction from Small Claims Court “re: WCC judgment” in the amount of \$658.03 (2018);
8. Draft Consent Order in the matter of *Hebron Hospitality Group Inc. v. 778938 Ontario Ltd.*, indicating the payment of the first installment of the security for costs by Hebron of \$11,750 as ordered by Justice Arnold and a final resolution of the claim(s);
9. Corporate Income Tax Return for Hebron Hospitality Group for 2019/01/27 to 2019/10/31 showing taxable income of \$33,450.

[22] It would appear that there remains, at least, the outstanding judgment against Hebron held by SEI Union (from the above list in *Hebron Hospitality Group Inc. v. 778938 Ontario Ltd.*), which is the largest debt on that list (\$14,184.74). Mr. Singh indicated to me that the “remaining” judgment against Hebron is being “addressed”.

[23] Mr. Singh also noted that the \$42,000 cheque (at #1 above), was a lump sum payment made to the plaintiff towards the outstanding loan. Mr. Singh believes that the present claim of the plaintiff does not take into account this payment.

[24] The plaintiff responds that this \$42,000 payment was made before their debt claim was filed (in February 2019) and, in any event, does not relate to the motion before the court. I agree.

[25] As to whether CPR 45.02(1)(b) has been met, I must also consider the rebuttable presumptions noted in CPR 45.02(3).

[26] CPR 45.02(3)(b) does not apply. Hebron does have an unsatisfied judgment in a proceeding (they have at least one, as admitted to by Mr. Singh, and possibly more if he was not referencing the SEI Union judgment). However, the Rule clearly states the requirement of “an unsatisfied judgment for costs”, and I have no evidence that this outstanding judgment is for that reason.

[27] CPR 45.02(3)(d) is clearly applicable here. Following the discharge of their counsel (in late 2019/early 2020), Hebron failed to designate an address for delivery, and/or failed to maintain it, thus requiring the plaintiff to take the additional step of needing and obtaining an Order for Substituted service. Hebron, through its principal Mr. Singh, has clearly not been engaged in this litigation, thus

forcing the plaintiff to expend additional time and resources in serving it with notice. This is all the more remarkable when one considers that Hebron has put forward a very substantial claim.

[28] It would appear, based on the Court's comments in the *Ontario* case, that Mr. Singh had difficulty staying engaged in that litigation as well. The court noted therein:

[14] Mr. Singh is reluctant to accede to the judicial process.

[29] I agree with the plaintiff's concerns that, should it be successful in the counterclaim, it will have undue difficulty in realizing on any judgment of costs awarded. I find CPR 45.02(1)(b) has been met.

The undue difficulty does not arise only from the lack of means of the party making the claim

[30] In the case of a corporate party, this requirement must be read in conjunction with CPR 45.02(3)(c), which creates a rebuttable presumption in favour of ordering security for costs where a corporate defendant does not appear to have sufficient assets to satisfy such a judgment. In such a situation, the Court would move to 45.02(1)(d) (i.e., fairness) as the only remaining question (*Ellph.com Solutions Inc. v. Aliant Inc.*, 2012 NSCA 89).

[31] In the present case, I acknowledge that I do not know anything specific about the assets of Hebron. I do note that Hebron, as well as the other corporate defendant, is presently revoked for non-payment at the RJS. That certainly is not evidence of a company on solid economic footing. In my view, it is fair to conclude that the requirements of CPR 45.02(3)(c) have been met.

In all the circumstances, it is unfair for the claim to continue without an order for security for costs

[32] In terms of “fairness”, I repeat and further consider all of the issues that I have already noted.

[33] I believe certain additional observations should be made under this heading. The counterclaim of Hebron is quite vague, to say the least. It is entirely captured in one very short sentence. It provides absolutely no detail whatsoever as to the facts supporting the claim, the specific tort or debt alleged, the nature of the damages claimed, or the way in which Hebron arrived at the “\$750K” figure. That is an enormously high figure to put forward in any claim, but here made even more striking by the complete lack of detail to support it. Quite frankly, it is impossible to assess either the seriousness of this claim, or the quantum put forward.

[34] Having said that, the plaintiff has no choice but to respond. This will require them to expend resources, both personal and financial. Given the circumstances of

Hebron, including their RJS revocation(s) and their past and current judgments, I can clearly appreciate the plaintiff's concerns about succeeding in the claim, being ordered costs, but being unable to realize on such an order.

[35] Given all of the circumstances of the matter and the parties, as I have outlined them in this decision, in my view, fairness clearly dictates that Hebron should be made to deposit security for costs in relation to their counterclaim. I find that the circumstances meet the requirements of CPR 45 and that, as a consequence, an order for security for costs should issue. Additionally, and in the alternative, I find this situation meets the criteria of s. 152 of the *Companies Act*.

Quantum of Order

[36] Rule 45 provides as follows:

45.03 Terms of order

- (1) An order for security for costs must require the party making the claim to give security of a kind described in the order, in an amount equal to or lower than that estimated for the potential award of costs, by a date stated in the order.
- (2) The judge may require any kind of security, including payment of money into court.
- (3) A judge who requires payment into court may fix a deadline for paying the entire amount, or permit the paying party to make the payment in installments.

45.04 Stay and dismissal

- (1) An order for security for costs stays the proceeding, or that part of the proceeding for which the security is due, until the security is given or the claim is dismissed.

(2) An order for security for costs to be paid by installments stays the proceeding until the first installment is made or the claim is dismissed.

(3) A party who obtains an order for security for costs may make a motion for dismissal of the claim if the party ordered to provide security fails to do so as ordered.

[37] The quantum of security for costs is in the discretion of the Court, depending on the circumstances.

[38] Often in making this determination, the starting point is the quantum of the claim, in order to estimate an approximate costs award in case of success (using the appropriate Tariff). Here, as I have already said, the claim of “\$750K’ is enormously vague; there is simply no way to know whether this figure is anywhere near a realistic assessment of Hebron’s claim. Obviously, using the \$750,000 figure in comparison with the Tariffs would yield an extremely high costs award. It seems obvious, and, in fact, the plaintiff agrees, that such a starting point would not assist in reaching an appropriate or reasonable quantum in the present motion.

[39] The plaintiff notes that we do have the known figure of \$290,000, this being the plaintiff’s claimed amount as against the defendants, and suggests that the Court use that as a starting point. The plaintiff further suggests an appropriate amount for security for costs would therefore be \$40,000 (based on Tariff A for \$290,000 (\$34,750), plus the additional costs for a four day trial).

[40] In the *Ontario* case noted above, the claimed amount was approximately the same as the plaintiff's present claim (\$290,000). In the *Ontario* case, security for costs was ordered in the amount of \$23,500 (to be paid in two equal installments).

[41] Quantum in the present matter should take into account that the claim is a counterclaim (not an originating claim). In other words, the plaintiff is already engaged in litigation against the defendant and so costs may be affected by that fact.

[42] Having regard to all the circumstances, I find that the counter-claimant Hebron must pay security for costs in the total amount of \$20,000, to be paid into court in two installments of \$10,000. The first payment to be made by April 30, 2021, and the second to be made before the Date Assignment Conference.

[43] The Order shall note that the counterclaim of the defendant Hebron is stayed until security is given (in the amounts and on the dates noted), or the claim is dismissed.

[44] The plaintiff is further granted costs of the present motion in the amount of \$1000 (Tariff C). This is in recognition of the fact that the motion required two appearances by counsel for the plaintiff, due to the non-appearance of Mr. Singh

on the first scheduled date. I ask counsel for the plaintiff to provide me with a draft Order.

Boudreau, J.